## Amalan Tepat Sdn Bhd v Hew Fong Yoke

HIGH COURT (MELAKA) — CIVIL APPEAL NO 1–12–65 OF 2004
LOW HOP BING J
27 JUNE 2007

*Civil Procedure — Summary Judgment — Triable issues — Counterclaim not struck out — Termination and obligations under SPA — Whether full hearing required*

*Civil Procedure — Counterclaim — Striking out — Whether plain and obvious case for striking out*

*Contract — Sale and purchase of property — Breach — Failure to deliver vacant possession of condominium within time period given — Whether termination of SPA valid*

Pursuant to a sale and purchase agreement ('SPA') between the appellant and the respondent for the purchase of a condominium, the respondent paid RM42,380 to the appellant. The appellant failed to deliver vacant possession of the condominium within the contracted time period and the respondent purported to terminate the SPA on the ground of the appellant's default and filed a summons to claim for the refund of monies paid. The appellant filed a defence and counterclaim of RM62,262.59 alleging that the respondent had breached the SPA by failing to make progress payments.

The sessions court judge allowed the respondent's application for summary judgment and dismissed the respondent's application to strike out the appellant's counterclaim.

The appellant-defendant appealed against the decision of the sessions court judge which allowed the respondent-plaintiff's application for a summary judgment. The issue to be determined on appeal was whether the appellant had raised a triable issue.

**Held,** allowing the appeal:

(1) Submissions were raised for the defendant that the defendant was entitled to terminate the SPA so as to preclude the entry of summary judgment in favour of the plaintiff. As regards counter claim, the fact that the defendant's counterclaim had not been struck out by the sessions court judge meant that the issue in relation to the parties' rights to terminate the SPA and their obligations under the SPA continue to be triable issues which require determination by way of a full hearing (see para 14).

(2) In the light of the defendant's counterclaim, there was a further dispute as to which party had committed a breach of the SPA (see para 22).

(3) Summary judgment entered must be set aside and a trial date must be given for the plaintiff (see para 23).

**[Bahasa Malaysia summary**

Menurut Perjanjian Jual Beli ('PJB') antara perayu dan responden untuk pembelian sebuah kondominium, responden telah membayar RM42,380 kepada perayu. Perayu gagal memberikan milikan kosong kondominium tesebut dalam masa yang telah dikontrakkan dan responden telah bercadang untuk menamatkan PJB atas alasan kemungkiran perayu dan memfailkan pernyataan tuntutan menuntut pengembalian wang yang telah dibayar. Perayu memfailkan pembelaan dan membuat tuntutan balas RM62,262.59 yang mendakwa responden telah melanggar PJB berikutan kegagalan membuat bayaran ikut kerja. Hakim mahkamah seksyen membenarkan permohonan responden untuk penghakiman terus dan menolak permohonan responden untuk membatalkan tuntutan balas perayu. Perayu-defendan merayu terhadap keputusan mahkamah sesyen yang telah membenarkan permohonan responden-plaintif untuk penghakiman terus. Isu-isu yang perlu ditentukan dalam rayuan adalah sama ada perayu telah membangkitkan isu-isu untuk dibicarakan.

**Diputuskan,** membenarkan rayuan:

(1) Fakta berkenaan tuntutan balas responden yang tidak dibatalkan oleh hakim mahkamah sesyen bermakna isu-isu yang berkaitan dengan hak pihak-pihak untuk membatalkan PJB dan kewajipan mereka di bawah PJB berterus-terusan menjadi isu-isu untuk dibicarakan yang perlu ditentukan melalui pendengaran penuh (lihat perenggan 14).

(2) Berkenaan dengan tuntutan balas defendan, terdapat pertikaian selanjutnya terhadap pihak mana yang telah melakukan perlanggaran PJB (lihat 22).

(3) Penghakiman terus tidak sepatutnya dimasukkan dan tindakan responden seharusnya diteruskan melalui perbicaraan penuh (lihat perenggan 23).]

**Notes**

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3170–3255.

For cases on breach of sale and purchase of property, see 3(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4360–4366.

For cases on striking out, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2005–2006.

**Cases referred to**

*Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 (refd)

*Chung May Yen v Puncak Dana Development Sdn Bhd* [2002] 7 MLJ 216 (dist)

*Ng Weng Sum v Lembah Beringin Sdn Bhd* [2002] 7 MLJ 211 (refd)
*Pulau Kembar Sdn Bhd v Yap Sew Lim* [2005] 1 LNS 3 (refd)
*Xavier Kang Yoon Mook v Insun Development Sdn Bhd* [1995] 2 MLJ 91 (dist)

**Legislation referred to**
Rules of the High Court 1980 O 18 r 19
Subordinate Courts Rules 1980 O 14 r 21(1)(d), O 26A

*Lee Choon Hei (Philip Chua & Co) for the appellant/defendant.*
*Mr Ramesh (Rastam Singa & Co) for the respondent/plaintiff.*

**Low Hop Bing J:**

APPEAL

**[1]** This is the appellant-defendant's ('the defendant's') appeal against the decision of the learned sessions court judge ('the sessions court judge') who had on 6 September 2004 entered for the respondent-plaintiff ('the plaintiff') summary judgment in the sum of RM42,380 together with interest at 8% pa from 17 December 1997 to the date of realisation and costs.

**[2]** The sessions court judge had on 1 February 2005 dismissed the plaintiff's application to strike out the defendant's counterclaim for RM42,380 and outstanding interest at 10% p.a., which amounted to RM19,882.59 as at 4 April 2000.

FACTUAL BACKGROUND

**[3]** By a sale and purchase agreement dated 14 October 1995 ('the SPA') and a deed of mutual covenant of the same date ('the DMC'), the defendant agreed to sell and the plaintiff agreed to purchase a condominium unit known as parcel No. B3/B/12-23 measuring 1086 sq ft within storey No 12 of Building No Block 3 held under HS(D) 3386 PT61 in the mukim of Pegoh, district of Alor Gajah Melaka ('the unit') at a consideration of RM211,900 upon the terms and conditions stated therein.

**[4]** Pursuant to the SPA and the DMC, the plaintiff made payments to the defendant amounting to RM42,380 as at 16 December 1997. The defendant was alleged to have failed to deliver vacant possession of the unit to the defendant within 36 months of the date of the SPA pursuant to cl 22(i) thereof.

**[5]** Consequently, vide letter dated 16 May 2003 issued by plaintiff's solicitors, the plaintiff purported to terminate the SPA on ground of defendant's default, and demanded the refund of inter alia RM42,380 within seven days of the date thereof, but the defendant has allegedly failed to do so.

**[6]** The plaintiff's affidavit in support contained substantially the same factual background as unfolded above.

**[7]** The defence stated, inter alia, that cl 9 of the SPA entitles the defendant to forfeit the RM42,380 being 20% of the purchase price of RM211,900 in addition to outstanding interest at 10% p.a. amounting to RM19,882.59 as at 4 April 2000 under cl 8 thereof. The defendant has made demands for these outstanding sums to be paid by the plaintiff but the plaintiff has allegedly failed to do so. The defendant's counterclaim is for these two sums amounting to RM62,262.59 together with interest at 8% p.a. from 18 August 2003 to the date of realisation and costs.

**[8]** The defendant's affidavit affirmed by its accountant denied owing the plaintiff the said sum of RM42,380 and alleged that the plaintiff has breached the SPA by failing to make progress payments, in addition to an outstanding interest of RM19,882.59 to the defendant thereunder.

OBLIGATIONS UNDER THE SPA

**[9]** It was submitted by learned counsel Mr Lee Choon Hei for the defendant that there is a triable issue in that the plaintiff has allegedly failed and/or neglected to pay the outstanding sums due under the SPA, in which case the defendant is entitled to forthwith terminate the SPA under cl 9.

**[10]** Plaintiff's learned counsel, Mr Ramesh contended that the plaintiff is entitled to terminate the SPA as the defendant has failed to complete and deliver vacant possession of the unit on or before 14 October 1998, ie, within 36 months from 14 October 1995, the date of the execution of the SPA. Support was sought in inter alia *Pulau Kembar Sdn Bhd v Yap Sew Lim* [2005] 1 LNS 3; *Chung May Yen v Puncak Dana Development Sdn Bhd* [2002] 7 MLJ 216; *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91; *Ng Weng Sum v Lembah Beringin Sdn Bhd* [2002] 7 MLJ 211; and *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675.

**[11]** In my judgment, the question for determination by way of rehearing in this appeal is whether, upon a careful consideration of the above factual background and submissions, the defendant has raised a triable issue so as to bar the entry of the summary judgment.

**[12]** For this purpose, I shall first consider the authorities cited for the plaintiff.

**[13]** In *Pulau Kembar Sdn Bhd*, the sessions court had dismissed the defendant's application to strike out the plaintiff's claim on ground of an abuse of the process of the court under O 14 r 21(1)(d) of the Subordinate Courts Rules 1980 and allowed the plaintiff's application for summary judgment under O 26A thereof. The defendant filed two appeals against both the decisions. However, against the entry of summary judgment in favour of the plaintiff, there was no submission by the defendant. Hence, there was no triable issue in relation to the summary judgment. There was also no merit in the defendant's appeal against the dismissal of the defendant's application to strike out the plaintiff's claim on ground of an abuse of the process of the court. In the circumstances, I dismissed both the defendant's appeals with costs.

**[14]** By way of comparison and contrast, in the instant appeal, submissions were raised for the defendant that the defendant was entitled to terminate the SPA so as to preclude the entry of summary judgment in favour of the plaintiff. Hence, in relation to the summary judgment, what was not raised in *Pulau Kembar* has indeed been raised in the instant appeal. Further, there was no counterclaim by the defendant in *Pulau Kembar* whereas in the instant appeal, there was a counterclaim. The fact that the defendant's counterclaim has not been struck out by the sessions court judge means that the issue in relation to the parties' rights to terminate the SPA and their obligations under the SPA continue to be triable issues which require determination by way of a full hearing.

**[15]** In *Chung May Yen*, pursuant to a sale and purchase agreement, the plaintiff bought a property from the defendant and made five progress payments at the request of the defendant. Thereafter, the defendant made no request for further progress payments. The plaintiff gave the defendant notice of termination of the SPA and then commenced an originating summons, seeking answers to the following questions:

(1) Whether the plaintiff is entitled to terminate the SPA?

(2) Whether the defendant is obliged to refund all monies paid by the plaintiff to the defendant and, if so, is it with interest?

**[16]** There, the defendant raised the issues of delay on the part of the relevant authorities to approve the supply of utilities to the property, and plaintiff's waiver. Azmel J (now FCJ) rejected the defendant's contention and answered the above questions in the affirmative.

**[17]** A similar situation surfaced in *Ng Weng Sum* and the same learned judge arrived at the same conclusion.

**[18]** It is abundantly clear to me that in *Chung May Yen* and *Ng Weng Sum* the respective defendants' failure to further request the plaintiff to make progress payments pursuant to the SPA in question is a fact which is readily distinguishable from that in the appeal before me. The defendant herein had demanded for payments pursuant to the SPA, which was why the defendant had filed the counterclaim against the plaintiff herein.

**[19]** In *Kang Yoon Mook Xavier,* the plaintiff-purchaser filed an originating summons against the defendant-vendor for a declaration that the defendant has breached the sale and purchase agreement executed between them and that the plaintiff has properly terminated the SPA, thereby entitling the plaintiff to a refund of the deposit, in addition to liquidated damages. There was no counterclaim by the defendant. The salient facts were that the purchaser had paid 10% deposit to the defendant for the purchase of a house from the defendant. The defendant had failed to complete the house within the contractual period of 24 months. Abdul Malik Ishak J held that the plaintiff was entitled to terminate the SPA and the liquidated damages.

**[20]** In *Ching Yik Development Sdn Bhd*, the facts are entirely different from those in the instant appeal. The application by the defendant there sought to strike out the plaintiff's action under O 18 r 19 of the Rules of the High Court 1980.

**[21]** It is to be noted that both in *Kang Yoon Mook Xavier* and *Ching Yik Development Sdn Bhd* none of the plaintiffs therein made any application for summary judgment. I am therefore unable to see how those two authorities can render any assistance to the plaintiff in the appeal before me.

**[22]** Reverting to the above factual background, in the light of the defendant's counterclaim, there is a further dispute as to which party has committed a breach of the SPA.

CONCLUSION

**[23]** On the foregoing grounds, summary judgment under O 26A should not have been entered for the plaintiff. The plaintiff's action should have proceeded to full trial. I therefore allow this appeal with costs, set aside the summary judgment entered by the court below and direct that an early date be given for the trial of the plaintiff's claim.

*Appeal allowed with costs.*

Reported by Lee Shih